

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD P. HAMEL and DEPARTMENT OF THE NAVY,
PORTSMOUTH NAVAL SHIPYARD, Portsmouth, N.H.

*Docket No. 95-1960; Oral Argument Held May 13, 1998;
Issued August 17, 1998*

Appearances: *James G. Noucass, Esq.*, for appellant; *Paul J. Klingenberg, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant established that he sustained a back injury causally related to factors of his federal employment.

On March 29, 1994 appellant, then a 42-year-old shipfitter supervisor, filed a claim, alleging that on December 3, 1993 he injured his back while carrying a heavy box while on temporary duty in Groton, Connecticut. Appellant did not stop work until March 11, 1994 when he filed a recurrence claim, stating that he could not work due to severe pain. In an undated statement, appellant indicated that on December 3, 1993 he initially felt minor pain while carrying the box and after several hours began to feel additional discomfort. As time progressed he felt increasing periodic pain that continued throughout December 1993 and January 1994. Following his return from temporary duty on January 31, 1994, he went on two weeks of annual leave and then suffered a severe cold and flu episode that lasted until the end of February 1994. When he returned to work in March 1994, the pain returned, becoming more severe on March 10, 1994. He then sought medical attention.

By decision dated May 17, 1994, the Office of Workers' Compensation Programs rejected the claim, finding fact of injury not established. The Office acknowledged that the December 3, 1993 carrying incident occurred, but found that the medical evidence did not support a causal relationship between the incident and appellant's disability. Following appellant's timely requests for reconsideration, in decisions dated September 19, 1994, December 28, 1994 and April 5, 1995, the Office declined to modify the prior decisions. The instant appeal follows.

In support of his claim, appellant submitted supporting statements from coworkers Mr. Willie Quintilla, Mr. Thomas R. Bramblett, and Mr. Michael Bourre that were generally

supportive regarding appellant's contention that he injured his back at work on December 3, 1993 and that his condition gradually worsened. He also submitted medical evidence including a March 11, 1994 report in which Dr. Jonathan P. Shill, a Board-certified family practitioner, diagnosed lumbosacral radiculopathy with mild L5-S1 spondylolisthesis determined by x-ray performed that day. He referred appellant to Dr. Stephen R. Klein, a neurosurgeon. In a March 14, 1994 report, Dr. Klein noted that this was appellant's first visit since 1978, reported a history that his pain had worsened when he carried a heavy box in early December, and diagnosed spondylolisthesis at L5-S1. In a June 22, 1994 report, Dr. Philip S. Anson, a Board-certified orthopedic surgeon, concurred in this diagnosis and recommend epidural injections and surgery. On August 17, 1994, Dr. Anson performed a posterior lumbosacral fusion with decompressive laminectomy. In a December 8, 1994 report, he noted that he had first seen appellant on June 22, 1994 and opined that the December 3, 1993 incident "should be viewed as the initiation of the progressive problem over the months that followed."¹

The Board finds that appellant has not established that he sustained an employment-related injury.

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of his or her claim³ including the fact that the individual is an "employee of the United States" within the meaning of the Act,⁴ that the claim was timely filed within the applicable time limitation period of the Act,⁵ that an injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁶ These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁷

The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged, or whether the alleged injury was in the performance of duty. Nor can the Office find fact of injury if the evidence fails to establish that the employee sustained an "injury" within the meaning of the Act. An injury does not have to be confirmed by eyewitnesses in

¹ The medical evidence also includes records from the employing establishment clinic indicating that on February 17, 1994 appellant returned to work following a two-week upper respiratory infection. A March 17, 1994 magnetic resonance imaging (MRI) of the lumbar spine that demonstrated an L4-5 spondylitic change with slippage and a small right paracentral herniated nucleus pulposus and L5-S1 grade I anterolisthesis. In a July 21, 1994 report, Dr. R. Reed Gramse, a Board-certified orthopedic surgeon, agreed with the recommendation for surgery.

² 5 U.S.C. §§ 8101-8193.

³ See *Daniel R. Hickman*, 34 ECAB 1220 (1983); see also 20 C.F.R. § 10.110.

⁴ See *James A. Lynch*, 32 ECAB 216 (1980); see also 5 U.S.C. § 8101(1).

⁵ 5 U.S.C. § 8122.

⁶ See *Melinda C. Epperly*, 45 ECAB 196 (1993).

⁷ See *Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and his subsequent course of action. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may cast doubt on an employee's statements in determining whether he or she has established his or her claim.⁸

The Board finds that, while the December 3, 1993 employment incident occurred, appellant has not established that the employment incident resulted in an injury. The Board has previously held that when diagnostic testing is delayed, uncertainty mounts regarding the cause of the diagnosed condition, and a question arises as to whether that testing in fact documents the injury claimed by the employee.⁹ The greater the delay in testing, the greater the likelihood that an event not related to employment has caused or worsened the condition for which the employee seeks compensation. When the delay becomes so significant that it calls into question the validity of an affirmative opinion based at least in part on the testing, such delay diminishes the probative value of the opinion offered.¹⁰

In the present case, appellant did not seek medical attention until March 11, 1994, more than three months following the December 3, 1993 employment incident. Given that the passage of a significant amount of time elapsed between the date of the injury and the diagnostic testing relied on by Drs. Klein and Anson to render their diagnoses and opinions regarding causal relationship, the probative value of these opinions regarding causal relationship is substantially reduced.

An award of compensation may not be based on surmise, conjecture or speculation.¹¹ Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.¹² Accordingly, the Board finds that the Office properly determined that appellant failed to establish a causal relationship between the claimed condition and the December 3, 1993 employment incident.

⁸ *Louise F. Garnett*, 47 ECAB ____ (Docket No. 94-1952, issued June 19, 1996).

⁹ *Linda L. Mendenhall*, 41 ECAB 532 (1990).

¹⁰ *Id.*

¹¹ *See Ronald L. Wilson*, 43 ECAB 271 (1991).

¹² *See Ruby I. Fish*, 46 ECAB 276 (1994).

The decisions of the Office of Workers' Compensation Programs dated April 5, 1995, and December 28, September 19 and May 17, 1994 are hereby affirmed.

Dated, Washington, D.C.
August 17, 1998

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member